

THE PRISON DISCIPLINARY SYSTEM
CONSULTATION DOCUMENT ON L J WOOLF'S PROPOSAL THAT BOARDS OF
VISITORS SHOULD CEASE TO CONDUCT ADJUDICATIONS

I Introduction

L J Woolf has recommended that Boards of Visitors should cease to conduct disciplinary hearings ("adjudications") in prisons. This document sets out the principal options for the future of the disciplinary system, including the proposal that L J Woolf has made, and invites comments on them. It is being distributed to all prisons and young offender institutions, and to representatives of agencies within the criminal justice system that might be affected by change. Its purpose is to provide a comprehensive basis for a public consultation, not to reach any firm conclusions about the merits of the options it describes. For those who come new to the subject the barest essentials of the current system are described at Annex A.

I.2. L J Woolf acknowledges his debt to the work of the Prior Committee, whose report (Cmnd 9641) was published in 1985. That report, and the White Paper that followed it (Cmnd 9920), provide the basis for several of the options included here. However, experience since Prior and L J Woolf's analysis of this particular issue have altered the context for debate. On the one hand, the incidence of judicial review of adjudications has declined and the reform of the code of offences and the improved guidance available to Boards have strengthened the current system. On the other hand, L J Woolf has produced a recommendation which, though abolishing the Board's disciplinary role, differs significantly from the Prior Committee's conclusion, and approaches the issue from a slightly different angle.

I.3. The relevant section of L J Woolf's report is attached at Annex B. The central elements of his critique are broadly as follows:

- justice in prisons is of the highest importance. It is not sufficient to meet standards of care and humanity alone if prisons do not also apply the basic tenets of natural justice.
- it is not possible or reasonable to expect Boards to carry out a disciplinary and a watchdog function.
- it is also not possible, given the extensive powers of punishment given to Boards, to exercise within prisons the procedural safeguards which are necessary for the proper discharge of the disciplinary function.

I.4. This paper therefore:

- i) sets out the options, including L J Woolf's ideas;



- ii) briefly assesses the implications of each proposal for a system of appeals against disciplinary decisions;
 - iii) points out some of the main implications for the interested parties of each option;
 - and iv) invites recipients to comment on the options presented.
- I.5. Comments should be sent, by 7 May, to Peter Dawson, DIA 1 Division, Room 712, Cleland House, Page Street, London SW1P 4LN.

II. Option A: Maintain the Status Quo

II.1. Under this option, Boards would continue to conduct adjudications on the more serious disciplinary offences.

Arguments in favour

II.2. If there is in reality no conflict between Boards' watchdog and disciplinary functions, this would be the most logical course to pursue. It would carry no significant new cost or training implications. It would build on the substantial investment since Prior in training and guidance for Boards. It would allow justice to be dispensed swiftly by people with a good knowledge of the establishment, and consequently an appreciation of the particular significance of what might otherwise seem to be minor offences. It would retain for Board members what some see as an additional "status" within the establishment, and, through the conduct of hearings, give them a first hand insight into the workings of the prison.

Arguments against

II.3. The watchdog and disciplinary functions would still not be reconciled. As a result, boards would rarely approach cases truly "de novo", and in any case the appearance of bias would be firmly ensconced in the prisoner's mind. Board members' pastoral work would continue to be undermined by their responsibility for awarding punishment. The system would offer few of the procedural safeguards normally associated with powers of punishment that, arguably, have a practical effect (in terms of additional imprisonment) greater than the maximum powers available in the Magistrates' Court. In particular, hearings would still be held in private, with no right to legal representation, no input from legally qualified participants (whether clerking or chairing) and no right to appeal on the facts.

Appeals

II.4. Under the current system, the great majority of appeals against Board adjudications are decided by officials exercising the Secretary of State's discretion under Prison Rule 56(1). Although these decisions are taken outside the management line, there is concern that they constitute an executive interference in a quasi-judicial process. The appeal is a paper review on judicial review tests (that is, on matters of procedure rather than fact) and there is no re-hearing at which either Boards or prisoners can be represented. Boards are usually consulted before decisions to interfere are implemented, and in the majority of cases, findings are only altered on the basis of principles already laid down by the courts. Nevertheless, the scope for discretion is considerable, and both Boards and prisoners will feel that they have reason to be aggrieved from time to time.

II.5. Given the levels of punishment that are at stake, the current limited right of appeal is subject to many of the same arguments as the initial hearing. However, to introduce a new and wholly independent appeal mechanism without altering the basic system for hearing charges in the first place might appear a lop-sided response to those criticisms.

II.6. This option would therefore leave unresolved a number of difficult issues surrounding appeals.

Implications

For Prisoners

II.7. The disciplinary system would remain a source of grievance, and attitudes towards Boards would continue to be coloured by their disciplinary role, to the same extent as at present.

For Staff

II.8. Staff would retain access to a rapid system of internal discipline that would incorporate existing powers of punishment. On the other hand, some would continue to have concerns about Boards' competence and the fact that punishments could be remitted either as a result of a successful appeal or as part of the procedure for restoration of remission for good behaviour. To the extent that the current disciplinary system fomented a sense of grievance amongst prisoners, it would follow that it would be a source of work for staff and impede the development of good relations between staff and prisoners.

For Governors

II.9. For Boards to function effectively as an upper disciplinary tier already requires a considerable investment from Governors in preparing for Board hearings and making staff available for them. Governors now have a very wide discretion as to whether or not to refer cases to Boards - if they feel that the Board's involvement is counter-productive they can reduce the number of cases that they refer to them. Where governors pursue such a policy, the inconsistencies between prisons are aggravated, and the Board affected rapidly loses experience and proficiency in conducting adjudications. This option would carry that risk. On the other hand, the current system has the potential to resolve serious matters quickly and with the minimum of disruption to the routine.

For Boards

II.10. Boards would continue to have to devote time to conducting adjudications, to local monitoring, and to training. Regardless of the arguments in principle, the need to carry out adjudications would impose a practical resource constraint on the watchdog function. Experience suggests that this would continue to be an issue on which opinion within Boards was divided.

For Prison Service Headquarters

II.11. Prison Service Headquarters would continue to have to review Board adjudications and to provide training and advice for Board members. The pressure to improve that training and guidance still further would be likely to be considerable. The system would be likely to be subject to increased criticism.

For Magistrates, Court Clerks, Police and the CPS

II.12. This option would carry no implications for these parties, unless a gradual loss of confidence in Boards were to bring about a small but unplanned increase in the referral of serious offences to the police for investigation.

Financial Implications

II.13. This option would bring neither new costs nor savings. The costs of servicing Boards' disciplinary role are considerable (though Boards themselves receive no remuneration), and there is an existing cost to the Service in terms of the extra time prisoners spend in prison serving lost remission. In 1990, provisional figures show that remission forfeited at Board adjudications was equivalent to an increase in the annual average population of around 570. The main elements of the existing costs of Boards conducting adjudications are described more fully under Option D.

III. Option B: Maintain the Status Quo except that Magistrates' Court Clerks would assist Boards at adjudications

III.1. Under this option, Boards would continue as at present, except that they would be assisted at their hearings by a Magistrates' Court Clerk, who would be able to advise them on questions of law and procedure, and whose role might also come to encompass assistance to all parties at the hearing, including the prisoner, if necessary. A 12 month pilot scheme providing court clerks to Boards in 13 establishments has been independently monitored by Rod Morgan and Helen Jones of Bristol University. Their report is to be published very shortly, and a copy will be sent to all Governors and Boards of Visitors. Copies will be obtainable, free of charge, from Miss Elizabeth Redfern, Room 715, Cleland House, Page Street, London SW1P 4LN (071 217 6221). The analysis of this option is based in the main on their findings. The proposed provision of court clerks was one of the elements of the Government's eventual response to the rejection of its initial post-Prior recommendations.

Arguments in favour

III.2. The option would go some (though not the whole) way to meeting the "procedural" criticisms of Board adjudications, by introducing an independent and qualified party to the proceedings. It would avoid the need for major organisational upheaval or re-training within the Prison Service and would have no legislative implications. There is some evidence from the pilot scheme that it would increase Boards' confidence in conducting adjudications.

Arguments against

III.3. The watchdog/disciplinary conflict would remain. The evidence of the pilot scheme is that the presence of court clerks made no impact on the perceived independence of Boards. The actual benefits in terms of improved conduct of hearings remain unproved. Although the pilot scheme demonstrated some increase in Boards' confidence and produced anecdotal evidence of good practice, clerks made no measurable impact on the conduct of hearings. If anything, the pilot scheme pointed to concerns about Boards' inquisitorial rigour rather than about their adherence to an acceptable procedure.

III.4. The cost of the option would be considerable, and the logistics of providing clerks to all prisons would be daunting. Current shortages of court clerks mean that there would be some doubt whether clerks could be made available to prisons in many parts of the country in the immediate future. The option would require its own administrative framework, whether in Prison Service Headquarters or within the Magistrates' Courts system, and would create a new and enduring training requirement. There would be few, if any, offsetting savings, given that the current clerk to the Board would retain much of the responsibility for

arranging hearings and ensuring that the appropriate administrative action was taken in response to them.

Appeals

III.5. The difficulties on appeals would be the same as for Option A, except that they might be made more intractable by the presence of a professional qualified adviser at the hearing. Where the advice from the court clerk and that from Prison Service Headquarters differed, the Board would find themselves in a difficult position. Potentially, findings reached with the advice of the clerk could be overturned by officials. The pressure to improve the official guidance to Boards and to promulgate the equivalent of "law reports" on overturned cases, would probably be considerable. Option B would do nothing to resolve the issues surrounding the appellate structure.

Implications

For Prisoners, Staff and Governors

III.6. There is little evidence that the presence of court clerks has had any significant impact on the perceptions of these groups. Except in so far as clerks might encourage a rather more rigorous style of questioning at adjudications, there would be relatively few implications for working procedures or workloads. The current (discipline office) clerk would no longer have to take the record of the hearing, and there would be marginal savings on training for those clerks, although a decrease in job variety and satisfaction might also result.

For Boards

III.7. The pilot scheme experience suggests that any apprehension amongst Boards could be gradually removed by the development of good relations with the court clerks. Not all Boards have found the clerks helpful. The option would be geared purely to assisting Boards at adjudications. It would have no implications for their overall workload and would not affect the balance of argument over the possible conflict between their watchdog and disciplinary functions.

For Prison Service Headquarters

III.8. The administrative burden of setting up and running this option would be substantial. The allocation, training and payment of clerks would all require new resources, either within the Prison Service, or within the Magistrates' Courts' Service if the tasks were subsumed there. The initial work of devising national arrangements would fall squarely to Prison Service Headquarters and there would be a continuing requirement to renegotiate arrangements, both nationally and, as population and use of the estate fluctuated, locally. Option B would leave Prison Service Headquarters with all its existing tasks, and be likely to create new pressure on the appellate structure.

For Magistrates' Courts and Court Clerks

III.9. It is possible that the implications of this option for the Magistrates' Courts' System are currently not supportable. There has been unease amongst magistrates on Boards of Visitors, for example, that the provision of court clerks for adjudications cannot be reconciled with the difficulties they see in their courts. In addition, the clerks' professional associations have always taken the view that the fees offered to clerks volunteering to take part in the pilot scheme did not reflect the true level of remuneration that would be necessary to secure their agreement to a national scheme. Although the pilot scheme does seem to have shown that local arrangements can work reasonably smoothly, it is clear that implementing a national scheme would raise a number of difficult practical issues.

For the Police and CPS

III.10. We see no implications for the police or CPS.

Financial Implications

III.11. The pilot scheme cost £47,637 in total, of which £13,863 went on training, and £33,774 on running costs. We estimate that there were "hidden" administrative costs of between £10,000 and £15000. Around 10% of establishments were involved. What is not clear from the pilot scheme is whether higher levels of investment in remuneration for clerks and in training would be necessary in a national scheme.

III.12. Apart from a marginal freeing of discipline office staff's time, which would be unlikely to result in sufficient savings at any establishment to justify a reduction in complement, this option would offer no savings.

IV Option C: Restrict authority to conduct adjudications to Board members who are also magistrates

IV.1 This option was briefly canvassed during the preparation of the White Paper that followed Prior. It proposes that only those members of Boards who are also magistrates should conduct adjudications.

Arguments in favour

IV.2. By restricting the disciplinary function to individuals who have received training as magistrates, it is argued that the quality of justice at adjudications may be improved. Fewer board members would need to be trained, and the training could concentrate on those aspects which were peculiar to the prison environment. It would require no legislative provision and no new administrative effort.

Arguments against

IV.3. Like Options A and B, this option would not address the watchdog/disciplinary conflict, and would meet "due process" criticisms only to a limited extent. It assumes that magistrates are necessarily better qualified to conduct an inquisitorial hearing than their colleagues. It would highlight a division in the membership of Boards which can already produce a certain amount of ill-feeling, and might in time lead to a practical division of the Board into members responsible for the watchdog function and members responsible for the disciplinary function. It is arguable that any major structural change of that sort should be planned and implemented formally rather than allowed to develop haphazardly over time.

Appeals and implications for other parties

IV.4. The implications for this option are similar to those for option A, except in so far as the adjudications training for Board members might be reduced because fewer members would be involved. The option could cause delays in bringing cases to a conclusion, however, if convening panels from a smaller pool of individuals were to prove difficult. There would also be a risk that the recruitment of Board members would be made more difficult.

Option D: A two tier system with the most serious offences dealt with as criminal charges in the outside courts. (The Woolf Proposal)

V.1. Under this option, Boards would lose their adjudicatory role. Governors would retain their existing maximum powers of punishment and continue to deal with the great majority of offences. Alleged offences which were judged too serious to be dealt with at a governor's adjudication and which, if proved, would constitute a criminal offence would be referred to the police for investigation and for prosecution if the CPS so decided.

Arguments in favour

V.2. The option would resolve any perceived conflict between Boards' watchdog and disciplinary functions. It would also meet entirely the due process criticisms in respect of more serious offences. It would not require primary legislation and would create no new bodies or administrative frameworks. It would develop existing procedures (governors may already refer charges to the police) and would emphasize the rule of law within prisons. It would free Boards of Visitors to concentrate on their watchdog role.

V.3. This option would require prisons to function without ready and swift access to very severe deterrent punishments. Deterrence would still be available, through the courts and at governors' adjudications, but the reform would require a major re-assessment of the levels of punishment for offences against discipline. The Governor's maximum punishment of 28 days forfeiture of remission would need to be more clearly recognized as a severe penalty. To the extent that this discouraged resort to disciplinary proceedings this could be argued to be a positive development. L J Woolf envisages that certain "breach of trust" offences, and in particular failures to return from temporary release and absconds from open prisons, would have to be dealt with largely by governors, greatly reducing (in some establishments) the normal levels of punishment for such offences. Again, to the extent that those offences came to be reflected more in a prisoner's progression through a sentence plan than in long extensions to the time spent in prison, this might be argued to be a positive thing.

V.4. This option would still ensure that serious offences by prisoners were adequately punished. In particular, remand prisoners may currently only forfeit remission prospectively - if they are acquitted, any serious disciplinary offence committed on remand may go unpunished. Dealing with all of the most serious charges in the courts would remove that risk. Similarly, it would ensure that all serious criminal offences committed inside prison were potentially subject to the penalties available under the criminal law, and not to the limited powers available to Boards. At a stroke, this option would remove the difficulties that currently surround appeals against the more serious

offences, by bringing them within the scope of the criminal system.

Arguments against

V.5. The principal argument against this option is that, below the most serious criminal offences, there may be certain disciplinary offences that are considered too serious to be dealt with by governors, but for which the courts would be an inappropriate forum. For these charges, the courts might introduce an unwelcome element of delay, an unnecessary degree of formality, and a considerable incidental expense because of the need to escort prisoners and because of the involvement of the police, CPS and courts in cases that are currently dealt with inside prisons. The courts might also fail to recognize and reflect the particular significance of certain offences in the prison context. Finally, it is argued that the sentences available to the court would not be sufficiently flexible to be effective in prison, being limited in the main to the imposition of a further sentence of imprisonment.

V.6. The Prior Committee considered these arguments against and accepted them, although they seem to have assumed that all criminal offences would have to be dealt with in outside courts. This is not L J Woolf's premise. Rather, he proposes that governors should retain their existing powers of punishment, and deal with the great majority of offences against discipline (whether or not they also amount to a criminal offence). The governor would have to exercise a judgement as to when an offence was properly beyond his or her remit.

V.7. The "cultural shift" that this option would require in some establishments should not be underestimated. There is a fear either that good order would not be achieved or that the maintenance of discipline could be driven "underground" if staff did not have confidence in the arrangements for the more serious offences. Arguably, this is a matter for good management and training, but the risk that the courts might not reflect the true seriousness of certain offences committed in prisons would need to be addressed. The potential practical difficulties and costs of this option are examined in more detail below.

Appeals

V.8. One of the most powerful arguments in favour of this option is that it solves the problem of appeals for the most serious cases. L J Woolf goes on to make proposals for appeals against findings reached at governors' hearings. Briefly, he proposes that in addition to the current avenue of appeal (to the Area Manager), there should be a further appeal against a negative response from the Area Manager. This would be to an independent Complaints Adjudicator, who would be able to review the case on the facts, if necessary convening a re-hearing, and who would ultimately have the power to alter the finding and remit or mitigate the punishment.



V.9. The proposal for an independent Complaints Adjudicator is a central element of L J Woolf's report, and will be addressed. Its significance as a potential new safeguard for the exercise of governors' powers at adjudication is clearly understood. However we do not consider that the resolution of this issue is necessary to a decision on his proposals for dealing with charges currently heard by Boards. In the interests of keeping an already lengthy document to manageable proportions, we have not sought to examine the issue of appeals against governors' decisions for any of the options.

Implications

For Prisoners

V.10. There is some limited research evidence that prisoners would prefer this option to the current system. Clearly some would stand to benefit, but others might find themselves facing harsher punishments than would otherwise have been the case. This is particularly true of remand and short-term prisoners.

For staff

V.11. The risk that staff might feel more vulnerable under this option has been alluded to. There is also a concern that staff might require training in the collection and presentation of evidence for criminal proceedings. Since Boards are already required to be satisfied beyond reasonable doubt on the evidence before them, and to inquire into charges, questioning officers in the process, it is arguable that the training implications should not be over-estimated. In any event, the main business of assessing and presenting evidence would fall to the police and CPS - the task for staff would be to learn from contact with those agencies what the courts would be likely to require.

For Governors

V.12. Under this option, governors would conduct more adjudications, although since Boards currently conduct less than 5% of hearings, and all will have been referred to them after a governor's initial hearing, the increase in work would be small. A more detailed survey of the resource implications appears below. Governors would, however, be required to take a more difficult decision than at present in inviting the police to investigate certain alleged offences, and clear guidance would be necessary. Governors in some establishments would also have to re-examine levels of punishment at their adjudications if they were to deal with a range of offences currently referred to Boards. They would also bear the primary responsibility for ensuring that any emergence of informal disciplinary sanctions was prevented. It is possible that a substantial review of the range and flexibility of punishments available to governors would be justified, although the development of better opportunities for prisoners and improvements in pay would have this effect without any need for a formal review.

For Boards

V.13. The implications for Boards in their watchdog role would be largely beneficial, and any perceived "loss of status" could be compensated for by the more efficient performance of that role. In the short term, some existing Board members might resent the loss of the disciplinary function, however, and feel that their knowledge of and influence within the prison had been impaired.

For Prison Service Headquarters

V.14. The need to train and assist Boards in their disciplinary role would be removed, as would the need to consider appeals against Board hearings. Appeals against the slightly higher number of hearings conducted by Governors might not entirely replace this work, precisely because the punishments awarded would be lower and less likely to give rise to grievances. However, the task of monitoring the developing liaison between prisons, the police and the courts, would be crucial.

For the Magistrates' Courts' Service

V.15. As is explained below, the number of additional cases coming to the courts (and for the most part, to magistrates' courts) might not prove to be large. If the estimates are reasonably accurate, this option would seem unlikely to require an increase in the size of any bench. The problems for the Magistrates' Courts' Service would therefore arise principally over the issue of education in the ways of prisons. Magistrates would not, by and large, have the same appreciation of the prison context as Boards. To some extent this might be addressed through visits and training, but it is arguable that an intimate understanding of the prison context would not be essential. It would be the task of the CPS to explain any special significance deriving from the fact that an alleged offence occurred in a prison, and the task of the defence to challenge those assumptions. Equally, it is arguable that magistrates are already more thoroughly trained in the business of deciding appropriate punishments than Boards. Part of their task would be to assess the real effect of any punishment (including financial penalties) that they wished to impose.

For the Police

V.16. It is argued that the police are traditionally unwilling to investigate offences that occur within prisons. The present system reinforces that reluctance, since Boards' powers of punishment are at least equivalent to those available to magistrates. There are more substantial obstacles to police investigation, not least the difficulty of obtaining witnesses, and the fact that it is rarely the police who are first on the scene. Some of the offences that governors would wish to refer might figure low on the local force's normal priorities, whilst some of the more serious incidences of mass indiscipline for example, would require a very substantial investment of their

resources, (although it should be noted that this has already been the case on many occasions; the experience of Boards in dealing with charges arising from mass indiscipline has been mixed).

V.17. There would undoubtedly be a proportion of cases in which the police either declined to investigate or reached an early view that the available evidence was not worth submitting to the CPS. That is an unavoidable fact of a system which requires a case to be proved beyond a reasonable doubt. That is the standard of proof that applies now to Board adjudications, however, so it is difficult to mount an argument in principle against this option on the grounds that some cases would not be pursued. The Scottish experience of a similar system appears to be that the quality of relations between the governor and the local police lies at the heart of its apparent success.

For the CPS

V.18. The decisions of the CPS on what to prosecute and their advocacy would in large measure determine the success with which genuine offences were brought to book.

V.19. It is likely that guidelines would have to be drawn up for governors to assist them in deciding the type of behaviour that might justify prosecution. For its part, the CPS might find that there was a need to increase its knowledge of the way that prisons operate, in order to reflect to the court the particular significance of certain offences within prison.

V.20. Finally, there might be a case for agreed time targets for bringing prison-related cases to trial, in order to reflect the particular requirement for speed in the institutional context.

Financial Implications

V.21. The resource implications of this proposal depend crucially on the number of cases that might be referred to the police and thereafter to the CPS and the courts. The only reasonable way to estimate this number is to examine the types of case currently referred to Boards and to make assumptions about the way they would be handled were this option to be adopted. Provisional figures for 1990 show that Boards heard 4,402 charges out of a total of 85,339. 3,768 of the charges heard by Boards resulted in an immediate (i.e. not suspended) or prospective forfeiture of remission. Of those 3,768 charges, 3,359 resulted in punishments of over 28 days loss of remission (i.e. beyond the governor's powers). Of those 3,359, 934 related to failure to return from or to comply with conditions of temporary release, and 710 related to escapes from custody which were not judged to warrant referral for a criminal charge. Other offences (including assaults, possession of drugs, concerted indiscipline) attracting over 28 days loss of remission amounted to 1275 in total. L J Woolf argues that the bulk of "breach of trust" offences (including prisoners who walk away from outside working

parties at closed establishments) should be dealt with by governors under the new system. Allowing for the distorting effect of the disturbances in 1990 on these figures and assuming that only around 50% of "escapes" from closed conditions would warrant referral to an outside court under this option, we estimate that these 1275 "other offences" attracting over 28 days loss of remission represent the most that might be referred to the police.

V.22. In practice, it seems likely that governors would refer fewer cases to the police than they do currently to Boards, and we have conducted a similar analysis therefore of adjudications in 1990 which resulted in punishments of 60 days or more loss of remission. On this basis the "other offences" come to 605 in total, and this represents perhaps the more likely volume of cases that would be likely to be referred to the police under Option D.

V.23. New costs would arise under the following headings:

i) Production costs and staff absences as witnesses:

Some production could be subsumed within existing arrangements for multiple productions, or at prisons with a court complex attached. In addition, some Board adjudications already require prisoners or staff to travel if a prisoner has been transferred immediately after an incident.

ii) Investigation costs to the police:

Most of the cases would not be especially complex, but the prison environment would clearly pose some difficulties.

iii) CPS costs on vetting and prosecuting:

Again, most cases would not be complex. One might assume too that percentage of the cases investigated by the police would not be referred to the CPS.

iv) Magistrates Courts' costs:

Spread across the country as a whole, these would appear to be slight, but courts close to one or more large establishments might notice an increase in workload.

v) Legal Aid costs:

One might assume that the CPS would sift out a percentage of cases referred to them. Legal Aid costs would arise on the overwhelming majority of those prosecuted.

vi) Additional Governors' adjudications costs:

Since all Board adjudications are already the result of charges referred from a governors' hearing, the additional workload might not be substantial.

V.24. We estimate that savings might be derived from the abolition of Board adjudications under the following headings:

- i) Staff time not spent at around 4,400 Board adjudications annually:
- ii) Savings on Legal Aid and Treasury Solicitor costs:
Up to around 100 Board adjudications annually are legally represented, with Legal Aid costs on all, and costs to the Treasury Solicitor, who represents the Governor.
- iii) Board members' expenses on attending adjudications and adjudications training and costs to the Prison Service of servicing Boards' disciplinary function.
- iv) The abolition of the need to review Board adjudications on appeal at Prison Service Headquarters.
- v) A reduction in the prison population, resulting from the absence of Board punishments and an overall reduction in the level of Governors' punishments, which was not matched by an increase in the number of custodial sentences passed on cases referred to the courts.

VI Option E: Visiting magistrates, exercising the powers currently vested in Boards of Visitors under Prison Rules

VI.1. Under this option, Boards would cease to conduct adjudications. Their place would be taken by visiting magistrates - a return in effect to the system which operated before Boards of Visitors took on a disciplinary role in 1972. Selected magistrates, trained for the purpose and assisted by their clerks, would attend the prison to conduct hearings under Prison Rules. As proposed in the aftermath of Prior, this option would not involve magistrates hearing criminal charges. This option is analysed purely on the basis of visiting magistrates replacing Boards as an intermediate tier between governors and the criminal system.

Arguments in favour

VI.2. Boards would be freed to conduct the watchdog role and trained magistrates with their clerks would be better placed to meet the standards of justice desired. There would be no requirement to create a new tribunal nor to find and appoint members for it. The presence of clerks would meet some of the "due process" criticism of the current system.

Arguments against

VI.3. The option would be expensive - at least as costly as Option B (Qualified Clerks) with additional implications because of the need to provide magistrates to hear around 4,400 cases a year. It would not address several of the fundamental procedural criticisms, including public access and the right to legal representation, and it would create a new demand to provide training for the magistrates involved. There might be a difficulty in appointing magistrates to meet the new demand, particularly if there was a feeling that the task was not one which they should be asked to perform.

Appeals

VI.4. This option offers no resolution to the difficulty of appeals. Indeed, unless a new body were set up to deal with appeals against the visiting magistrates' decision that task would still fall to officials exercising the Secretary of State's discretion. There would be likely to be strong objectors to this. This option carries with it therefore a potential requirement in the future to create a new, and inevitably costly, appeal body, or to legislate for an avenue of appeal to the Crown Court.

Implications

For Prisoners

VI.5. For prisoners, this option would represent no change in substance from the current system, except in terms of the increased authority of Board members as watchdogs.

For staff and Governors

VI.6. Again, the changes in substance would^{over} be minimal.

For Prison Service Headquarters and the Lord Chancellor's Department

VI.7. There would be a substantial administrative cost to servicing this option, particularly in appointing and training magistrates.

For the Magistrates Courts' Service

VI.8. As with Option B above, there might be a doubt over the capacity of the magistrates' courts' service to respond to this option. Because it offers no increase in the proportion of cases handled by governors (unlike Option D), the caseload for visiting magistrates and their clerks would be more likely to go beyond the resources that are either available or obtainable in certain parts of the country. It is possible also that the current pressures on training for magistrates (particularly in the light of the heavy requirements of the Criminal Justice Bill) would ~~NOT~~ allow space for training some in adjudications. Option D, which keeps magistrates in a familiar environment and in an adversarial system, would appear to have less demanding training requirements.

For the Police and CPS

VI.9. We see no implications for the police or the CPS.

Financial Implications

VI.10. In 1985, the probable cost of running this option on a caseload of 4,000 was estimated at around £750,000 p.a., with start-up costs of £550,000, and increased legal aid costs of £120,000 arising from a probable increase in the granting of legal representation. Allowing for inflation at an average of 5% in the intervening years, the cost of this option for a similar caseload now might be in the region of £1.15m annually, with start-up costs of £0.75m.

VI.11. The only savings which might arise would be in the costs of servicing Boards in their disciplinary role.

VII Option F: The Prior Tribunal

VII.1. The "Prior Tribunal" would consist of panels, each with a legally qualified chairman and two lay members, and with a Circuit Judge as its president. Chairmen would be solicitors or barristers of at least seven years standing. The administration of the Tribunal would be entirely independent of the Home Office. Boards would lose their adjudicatory function, which would be taken up by the Tribunal. The Tribunal would not be within the criminal system, and the most serious offences would continue to be referred to the police.

Arguments in favour

VII.2. The Tribunal would resolve the disciplinary/watchdog conflict and meet many (though not all) of the due process criticisms of prison discipline. After Prior, it attracted the support of many organisations outside Government. In theory, it would strike a balance between the perceived need for a dedicated intermediate tier providing rapid justice in prisons, and the fear that such justice could be second-rate.

Arguments against

VII.3. These were summarised in paragraph 29 of the White Paper (Cmdn 9920) that responded to Prior. In essence, they were that the Tribunal would create an unwieldy bureaucracy, that it would draw on a small and over-used pool of legal talent, and that it would constitute a more "weighty" tribunal than the magistrates' courts for whom the most serious offences were still reserved. It was consequently the most expensive of the options presented by that White Paper.

Appeals

VII.4. Prior also recommended the creation of a new Appeal Tribunal, to serve as an avenue of appeal against the decision of the disciplinary Tribunal (which in turn could hear appeals against governors' findings). The Government concluded that there was no need for the Appeal Tribunal, given the existing rights of appeal to the Secretary of State and on judicial review.

VII.5. As with Option E, the only obvious alternative to a separate appeal body, other than to leave matters as they stood, would be an avenue of appeal to the Crown Court.

Implications

For Prisoners

VII.6. It is not clear to what extent the Prior Tribunal would seem to prisoners to offer any substantial change. It would still be internal, private and offer no right to representation. The punishments for disciplinary offences would continue to be higher than those available to magistrates on criminal cases.

For Staff and Governors

VII.7. Like visiting magistrates, the Prior Tribunal would offer an acceptable substitute for Boards, provided that the Tribunal's administration and resources could meet the demands for speedily arranged hearings. The Tribunal might require higher standards of evidence gathering and presentation, however, and be more likely to grant legal representation than Boards, with consequent and significant implications for staff training working methods, and costs to the Treasury Solicitor and on Legal Aid.

For Prison Service Headquarters and the Lord Chancellor's Department

VII.8. The administrative consequences of the Prior Tribunal would constitute a large part of its expense and would be substantial. The initial requirements for training both inside and outside the Prison Service would also be very considerable. Updated estimates, based on the calculations for the 1986 White Paper, are shown below.

For the Magistrates' Courts' service and the Crown Courts

VII.9. It is probable that the bulk of lay members for the Tribunal would come from the same pool as potential or serving magistrates, and the chairmen from the pool for potential judges.

For the Police and the CPS

VII.10. We see no implications.

Financial Implications

VII.11. In 1985, the costs of the Prior Tribunal on a caseload of 4,000 were estimated to be £670,000 on running costs and £120,000 on increased legal aid, with £630,000 on start-up costs. Assuming inflation at 5% p.a. in the intervening years, the Tribunal now might cost in the region of £1.06m to run, and £0.85m, to set up. As with Option E (Visiting Magistrates), we doubt that there would be significant offsetting savings.

VIII Option G: A "slimmed down" Tribunal

VIII.1. This option represents the alternative proposal that the Government put forward in 1986 in rejecting the Prior Tribunal. The Government's Tribunal was to be a panel of lay people with a lay clerk (although with the option of calling for the attendance of a qualified clerk if they so chose). Board members were to be disqualified from sitting on the Tribunal.

Arguments in favour

VIII.2. This option would resolve the watchdog/disciplinary conflict, and make some impact on the "due process" problems. It would retain the speed and local knowledge particularly appropriate to the hearing of disciplinary, as opposed to criminal, charges.

Arguments against

VIII.3. The Tribunal would, in practice, offer little or no defence to the "due process" criticisms of adjudications. Although less cumbersome than the Prior Tribunal, it would entail expenditure on a new administrative structure to support it. Because this structure would be within the Prison Department, the Tribunal would appear firmly part of the "establishment" from its inception. In the aftermath of the White Paper, this proposal received no support from any quarter outside government.

Appeals

VIII.4. All of the arguments in favour of an independent appellate mechanism apply with the same force to this option. It offers no resolution of that particular issue.

Implications

VIII.5. The implications of this option would be very similar to those for Option F, the Prior Tribunal. It would not call on the pool of potential judges, however, and the cost implications would be substantially different. In 1985, those costs were estimated at £0.4m, which, applying the same inflation of 5% p.a., would result in costs of around £0.54m at today's prices.

IX Conclusion

IX.1. We have sought to provide a necessarily brief analysis of the principal options for the future of the disciplinary system. Where options have been canvassed in detail before, our analysis is particularly cursory, and is in no sense intended to supplant or ignore the wealth of detailed comment that the Department has received in the past on them. We should welcome views on any or all of the options, both as to their merits in principle and on the practicality of implementing them, in the light of the experience of the last three or four years, and of the contribution which L J Woolf has made to the debate in this area.

DIA 1
March 1991

WOOLF.BOV

The code of offences against Prison Discipline is contained in Prison Rules. It covers behaviour ranging from minor breaches of discipline to potentially very serious offences such as assault and escape. All charges are heard initially by the Governor, who may impose up to 28 days' loss of remission as a punishment. If the Governor concludes that the charge may merit greater punishment if found proven, he or she may refer the case to the Board of Visitors who will conduct a fresh hearing. Since April 1989, following the Prior Report, the maximum punishment that may be imposed by the BoV for a single charge is 120 days' loss of remission in the case of an adult and 90 days in the case of a young offender.

The range of punishments available includes loss of earnings and of privileges, and cellular confinement, for example, but the power to forfeit remission remains as a means of reflecting the serious nature of some offences. Under current proposals in the Criminal Justice Bill, the power to award additional days (delaying the date of release into the community) will operate in the same way and within the same limits as the current power to forfeit remission.

handled by the Prison Service.

14.361 This may be a particular concern in relation to Prison Rules and Regulations and "Reserved" subjects. So far as these matters are concerned, we would prefer there to be no special restriction placed upon the jurisdiction of the Complaints Adjudicator. However in practice, we would not expect the Complaints Adjudicator to make recommendations which conflicted with decisions on the merits by Headquarters. He would regard his role in such cases as being a supervisory role. It would be similar to that performed by the High Court in judicial review, a role which primarily involves scrutinising the decision making process.

14.362 It would be necessary for the Complaints Adjudicator himself to establish time limits within which he should respond to the prisoner making an application to him. We would suggest that, following acknowledgement of the receipt of the application, he should aim to provide a substantive reply or a progress report within six weeks and, if further work is needed, at three weeks intervals thereafter. (We would expect a substantive reply always to be available within 12 weeks.) Each prisoner should receive a written reply to his complaint, with reasons for the Complaints Adjudicator's response and for any recommendations made. The Complaints Adjudicator should also report to the prisoner on the Prison Service's response to any recommendations he has put to the Service or to the Home Secretary.

Disciplinary Procedures

i) The History

14.363 The most authoritative source on the prison disciplinary system is the Report of the Committee under the Chairmanship of Mr Peter Prior. The Committee was appointed by the Home Secretary in May 1984 to examine the arrangements for dealing with alleged disciplinary offences by prisoners.

14.364 The Committee reported on 3 October 1985 with some 100 recommendations. Among those, it recommended that Governors should continue to deal with most offences against discipline; that Board of Visitors should lose their adjudicatory role; and that more serious charges should be heard by a newly established independent body to be called the Prison Disciplinary Tribunal. The Tribunal would consist of a number of panels, each with a legally qualified chairman and two lay members. A circuit judge would be appointed as President. Chairmen were to be solicitors and barristers of not less than seven years standing.

14.365 The Prior Committee proposed that a prisoner should have a right of appeal to this Tribunal when the Governor's punishment exceeded seven days forfeiture of remission. Offences could also be remitted to the Tribunal, when it would have a maximum punishment available to it of 120 days forfeiture. Where the prisoner appealed against a finding by the Governor, the appeal

would be by way of rehearing. When the appeal was against the punishment only, the prisoner would have a right of access to the Tribunal. There would also be a system of appeals against decisions of the Tribunal to an Appeal Tribunal composed of the President and selected members of the Disciplinary Tribunal. The Appeal Tribunal was to give reasons for its decisions.

14.366 The Committee also proposed that there should be a new and clearer code of disciplinary offences.

14.367 The Government published its reply in a White Paper in October 1986 entitled "The Prison Disciplinary System in England and Wales". The Government announced that it proposed to accept the recommendations of the Prior Committee that Boards of Visitors should lose their disciplinary functions; that the disciplinary role and powers of prison Governors should remain substantially unchanged; and that there should be a new code of disciplinary offences. It accepted the idea of a Prison Disciplinary Tribunal, but suggested that the local panels should be lay people rather than that each panel should be headed by a lawyer. The White Paper estimated that the annual cost in 1986 of its more modest proposal would be about £0.4m, compared to the cost of the full Prior Tribunal of £0.9m.

14.368 The Government suggested that there should be a right of appeal to the local panels from the Governor's decision when more than 14 days forfeiture had been awarded. Judicial review should continue to be available as a last resort.

14.369 The Government announced its intention to bring forward early legislation to establish the new Prison Disciplinary Tribunal which it proposed.

14.370 It was not to be. There was what the Prison Service described to us as:

"A subsequent failure to achieve consensus on the form a new Tribunal should take".

14.371 Some Boards of Visitors, perhaps then the majority, were concerned about the central proposal that they should no longer be involved in adjudications. They felt then, as some still feel now, that adjudications did not compromise their independence and were useful in giving them the knowledge necessary to fulfil their "watch-dog" role.

14.372 The Government's option of lay panels, with no legal chairmen, was not universally accepted as providing a sufficient way of ensuring that standards of justice were introduced in the consideration of serious offences in prison.

14.373 The Government decided, therefore, to stick generally with the present system. It met the Prior Committee's recommendations for a clearer

list of disciplinary offences. And it introduced an experiment, to which we shall refer later, in providing Clerks of Justices to give advice to Boards of Visitors when they were adjudicating.

ii) The Present Situation

14.374 The present position, therefore, is that Governors and Boards of Visitors adjudicate on prison disciplinary offences. These offences are set out in Prison Rule 47 as amended by the Prison (Amendment) Rules 1989. Among the 22 offences set out in the Rules are such offences which could, in certain circumstances, represent a criminal offence - such as assault, fighting with any person, and taking improperly any article belonging to another person or to a prison. Other offences are clearly related to infringements of the institutional life of a prison - such as denying access to any part of the prison to any officer, or being disrespectful to any officer or person visiting a prison, or intentionally failing to work properly or, being required to work, refusing to do so. There are also "catch-all" offences - such as that the prisoner "disobeys or fails to comply with any rule or regulation applying to him", and "in any way offends against good order and discipline". It is also an offence if a prisoner "disobeys any lawful order".

14.375 In evidence to us, the Prison Service accepted that the first two of these catch-all offences gave critics cause for concern. The Service told us that Governors were encouraged to keep to a minimum the number of local rules and regulations which might form the basis of a charge that the prisoner had disobeyed or failed to comply with such rules and regulations. The Service considered also that, on balance, "the variety of offending behaviour within establishments" was such that an offence of offending against good order and discipline should be retained. But the Prison Service emphasised the importance of using specific charges wherever possible. This view was confirmed in a note of 12 April 1990 from the then P3 Division in Headquarters to the governors of all establishments. The note advised on the laying of disciplinary charges following the disturbances in early April. The note said that, as far as possible, inmates should not be charged with offending against good order and discipline. We are in full agreement with this guidance.

14.376 The decision about whether a particular disciplinary offence should be heard by the Governor or should be remitted to the Board of Visitors is a matter for the Governor. He is required to enquire into every charge not later than the next day after the charge is laid, unless that day is a Sunday or public holiday. The Prison Service's manual on the conduct of adjudications published in January 1989 (and available in prison libraries or for sale to prisoners at £2.50,) adds:

"However, if the offence is sufficiently serious to warrant a punishment higher than the Governor has power to impose, he may refer the charge to the Board of Visitors, provided he is satisfied that there is a case to answer".

14.377 We received evidence from Mr Heap, the Clerk to the Justices' of Cardiff Court. Mr Heap was involved in the scheme for Clerks assisting Boards of Visitors. He had sent a questionnaire about the operation of the scheme to his fellow Clerks. (We shall refer to other aspects of this questionnaire later). Mr Heap told us that most of the 11 Clerks who had replied to his questionnaire had noted that the referral of a case by the Governor to the Board was seen by Board members as requiring a penalty in excess of the Governor's maximum. This confirms our own assessment, having spoken to Governors and Boards. This is clearly not a satisfactory basis on which to conduct an adjudication. We also received the distinct impression from some members of Boards that they would feel that they were letting down the prison if they did not find a charge proved.

14.378 The Governor, and to a much greater extent the Board of Visitors, have extensive powers to punish disciplinary offences. The most serious of those punishments, and the one which the Prison Service told us was the most commonly used, is forfeiture of remission. The Governor has a power to order forfeiture of remission to a sentenced prisoner for a period not exceeding 28 days, and the Board of Visitors for a period not exceeding 120 days. Consecutive punishments of forfeiture are possible for related offences, but the total may not exceed 28 days for the Governor or 180 days for the Boards of Visitors. For young offenders, the initial punishment is 28 days for the Governor and 90 days for the Board of Visitors; and for consecutive punishments, 28 days again for the Governor and 135 days for the Board of Visitors. An unconvicted prisoner may be awarded prospective forfeiture of remission, which would then have to be served if he were subsequently convicted and given an immediate prison sentence.

14.379 There are other penalties which, again, provide different scales for the Governor and for the Board of Visitors. They allow the forfeiture of any privileges, exclusion from associated work, forfeiture of pay, cellular confinement and, for unconvicted prisoners, loss of the rights to books, writing materials and other means of occupation and, if found guilty of escaping or attempting to escape, of the right to wear their own clothing. Punishments may be suspended for up to six months, except, other than in special extenuating circumstances, in respect of forfeiture of remission.

14.380 Forfeiture of remission may also be restored, but before applying for restoration adult prisoners must spend nine months from the date of the offence, and young offenders six months, without losing any further remission.

14.381 The position about forfeiture of remission will change if the proposals in the Criminal Justice Bill at present before Parliament are accepted. This is because the Bill replaces the current system of parole and remission of sentence with new arrangements. These would provide for short term prisoners (those serving a term of less than four years) to be released once they had served half their sentence, and for long term prisoners (those serving a term of four years or more) to be released once they had served two thirds of their

sentence. (Where the sentence is one of more than 12 months, the release is on licence.) In addition, long term prisoners could be released on licence at the discretion of the Secretary of State on the recommendation of the Parole Board once they had served one half of their sentence.

14.382 The Prison Service told us that, if these proposals were implemented, power to forfeit remission would be replaced by a power to award "additional days". The Prison Service explained the provision as follows:

"The effect of the additional days would be to postpone the date on which a prisoner is released from prison custody. However, neither Governors nor Boards will be able to extend the total length of the original sentence passed by the Courts". (their underlining)

14.383 The Prison Service added:

"It is our intention to duplicate the current system by which loss of remission can be restored by Governors and Boards. Through good behaviour, a prisoner will be able to cancel out the 'additional days' awarded at disciplinary hearings."

14.384 Provisions on these lines have been included in the Criminal Justice Bill at present before Parliament.

14.385 We recognise the Prison Service argument referred to above that neither Governors nor Boards can extend the total length of the original sentence. So, on this argument, the award is not, strictly speaking, an additional prison sentence. That argument applies equally to the present system of forfeiture of remission. But that is not how it seems to prisoners, and with some reason. The fact is that a Board of Visitors can, for a single offence, keep a prisoner in prison for 120 days longer than he otherwise would spend. This at present is seen by the prisoner as the equivalent to him or her being awarded a sentence of imprisonment of nine months (in order to spend the same amount of time in prison, allowing for full remission). This length of sentence is beyond the range of powers available to the Magistrates Court. The powers of the Board of Visitors are therefore very considerable.

14.386 We have already stated in Section 12 that we consider that the adjudicatory function of a Board of Visitors is not consistent with their watchdog role. Because they conduct adjudications, Boards of Visitors are not seen by prisoners as fair or impartial. In the survey conducted by Mr John Ditchfield and Mr David Duncan for the Prior Committee, they found that:

"Inmates clearly believed that the adjudicatory system was heavily biased against them and that the inclination of both Governors and Board members was to believe staff, rather than them."

They added:

"Prison officers did not share this perception, but there was evidence that some Governors accepted the system to be biased in this general sense."

14.387 Significantly, as we shall explain, the survey also found that:

"When given the alternatives of having serious breaches of discipline dealt with by the Board of Visitors, the Governor (with increased powers of punishment) or an outside court, the majority of all four groups of respondents [that is inmates, officers, Governors and members of the Board of Visitors] preferred the outside court."

14.388 For less serious offences, the finding was that:

"A clear majority of inmates expressed a preference to have them dealt with by the Governor rather than the Board of Visitors even though the Board was perceived by them as being slightly less biased. The Governor's more limited powers of punishment was the main reason for this choice".

14.389 These findings confirmed the research by Mr Mike Maguire and Dr Jon Vagg on the Watch-dog Role of Boards of Visitors published in 1984. We referred to it in Section 12. They found that the majority of prisoners felt that Boards of Visitors' adjudications were controlled "behind the scenes" and were biased against them. They found also that a substantial number of staff interviewed (29%) said that they had witnessed some kind of procedural incompetence on the part of Board of Visitors members at adjudications.

14.390 There are two principal concerns with continuing with adjudications by the Boards of Visitors. First, as we have discussed in Section 12, we do not consider that it is possible or reasonable to expect a Board of Visitors to act as both watch-dog and as an adjudicatory body. That is confirmed in the research and in the Prior Report. From the evidence we have received and the discussions we have had, we believe that is now accepted by many members of Boards of Visitors. We wish to enhance and develop the work of Boards of Visitors as effective watch-dogs monitoring the system, and advising and assisting prisoners, staff and management. That cannot be achieved if they continue with an adjudicatory function.

14.391 We considered whether Boards should act as some form of appeal body against the decisions of the Governor. We were persuaded by the views expressed at the public seminar, including by a member of the Co-ordinating Committee of Boards of Visitors, that that would be seen as a return by the back-door to all the problems of maintaining the independence of the Boards of Visitors which exist at present. While, in our view, that is a misapprehension, we accept that that would be likely to be the view of the majority of prisoners, and that is not something we would wish to perpetuate.

14.392 There is a second reason why we have concluded that it is essential to remove this function from Boards of Visitors. We do not think it is reasonable to expect Boards conducting adjudications in prison, with the extensive powers they have been given, to exercise the procedural safeguards which are necessary for the proper discharge of such a function. We do not consider that the option of appointing a Justices' Clerk to assist a Board of Visitors' adjudicating panel, while useful, is the whole or a sufficient answer. The Prison Service established in November 1989 a one year pilot scheme starting in 13 establishments to assess both the practicality and the potential benefits of such an idea. This scheme has been independently monitored by one of our Assessors, Professor Rod Morgan and by Ms Helen Jones of Bristol University. In forming our conclusions, we have not had sight of or been briefed about that research. We received evidence, however, at one of our public seminars from the Clerk to the Justices' in Cardiff, Mr Heap, to whom we have already referred. He showed us the report which he presented at the seminar. That report, which, as we have said, was based on the replies from 11 of the 13 Justices' Clerks concerned, noted that there was:

"An overwhelming majority of views that there was a closeness between members of the Board and prison staff."

14.393 It noted also:

"In some institutions there were meetings prior to hearings, always informal, between members of staff and Boards. It is impossible to tell whether these meetings involved discussions of cases to be dealt with."

14.394 Mr Heap's report also concluded that:

"Those who were ready to state a view indicated by considerable majority that the Board of Visitor did not use the same care in approaching LOR [the penalty of loss of remission] as Justices would have approached imprisonment."

14.395 This evidence confirms us in our recommendation that Boards of Visitors should no longer be involved in adjudicatory hearings. Nor should they adopt an appellate role in relation to these hearings.

14.396 Previous reviews came to similar conclusions. The problem has been to identify what should be put in the Board's place. It is on that rock that further progress has foundered. A good deal of the evidence we received suggested that the time had now come to introduce the Prison Disciplinary Tribunal proposed by the Prior Committee. Those who took this view included the POA, Professor Martin (who was involved in the preparation of the Jellicoe Report on Boards of Visitors to which we referred earlier), the Law Society, and the Prison Reform Trust. We heard powerful argument in support of this view at the public seminar.

14.397 We are conscious, however, that these ideas have been on the table for some time and have not been taken up. Cost is a factor. So is complexity. We have felt it right to go back to the basic principles and, from there, to adopt a different approach.

iii) Our Proposals

14.398 Our starting point has been a consideration of the place of disciplinary proceedings within prisons. We have examined the degree to which offences within prisons can be dealt with as disciplinary offences or need to be referred to an outside body. We have looked at the criteria which should apply. We have considered also the penalties which should be available within the disciplinary system.

14.399 The Prison Service, in its written evidence, stated that 95% of all charges are dealt with without reference to the Board of Visitors. In 1989, the Board heard 4,497 charges and Governors heard 81,215 charges. The Prison Service told us that the overwhelming majority of charges brought forward were found proven. In 1988, when Governors heard 80,478 charges and Boards of Visitors 4,119 charges, only 3,730 charges were dismissed. (These figures for charges heard, like those quoted above for 1989, included hearings started but not completed that year.)

14.400 We were also informed by the Prison Service that the 80,000 offences punished in 1988 represented an average of 1.6 offences per prisoner. The most commonly used penalty, as we have noted above, was forfeiture of remission, equivalent, at the maximum for a single offence, to a nine months prison sentence. The Prison Service said that:

"In 1988, the amount of unsuspended forfeiture of remission awarded has been calculated as equivalent to approximately 600 to 700 of the annual average population".

14.401 This is an astonishing extra burden on the Prison Service. It needs to be controlled and relieved. The award of loss of remission on this scale, in effect keeping people in prison longer, will be brought into particular relief if the proposals we have described in the Criminal Justice Bill are implemented. The penalty then will clearly be seen to be additional days spent in prison.

14.402 If penalties equivalent to quite long prison sentences are required, then it is more satisfactory that they should be awarded by a Court. That would allow a trial which provides the full safeguards of the criminal law. Penalties of this length can only be justified by an infraction of the criminal law and not by a breach of disciplinary rules.

14.403 We consider that, in respect of offences committed in prison, a clear distinction should, therefore, be drawn between disciplinary proceedings and criminal proceedings. The former are proceedings which are properly brought

with the limited objective of maintaining order within the confines of a prison. They should be subject to a level of penalties and a formality of procedure which is commensurate with that objective.

14.404 Criminal proceedings are brought in order to protect the public interest in enforcing and preserving public law and order. There the penalties may be higher, but the procedural safeguards must be greater. The fact that some disciplinary proceedings also involve the commission of criminal offences is not decisive. The distinction between the two situations was clearly drawn by Lord Justice Shaw in a judgment which marked a watershed in this area of the law in the case *R v Hull Prison Board of Visitors, Ex parte St Germain and Others* [1979] Q.B. 425, at pp. 454/5.

14.405 We recommend that all disciplinary proceedings should in future be conducted by a governor of the prison in which the alleged disciplinary offence took place. There is, in our judgement, no need in such cases, at the first stage of a disciplinary proceeding, for the charge to be heard by an outside body, be it a Court or a specially created tribunal. Furthermore, we consider that, for disciplinary offences, the present powers of punishment of a governor are adequate. The high scale of penalties at the present time in part reflect the practice of the Board of Visitors normally to impose a greater punishment than that available to governors. They are not, in our view, justified by the nature of the offences charged. Nor are there sufficient procedural safeguards to make just such a level of punishment. We therefore recommend that the greater powers of punishment which at present are exercised by the Boards of Visitors should be abolished.

14.406 It should continue, therefore, to be open to a governor to award forfeiture of remission, or, under the Criminal Justice Bill, added days, on the same levels as at present - a period not exceeding 28 days. But, as the facilities and opportunities for prisoners improve, as we have proposed they should, then there should be more recourse by a governor to punishments which involve loss of facilities and opportunities, rather than loss of remission or added days in prison. The problem at the present time is that a prisoner has little to lose apart from remission - that should not be the position in the future. As the improvements accrue, the facilities and opportunities will need to be reviewed from time to time, in order to determine which may be appropriately restricted as a result of disciplinary proceedings. Those which should be regarded as being part of the prisoner's basic standard of life should not be curtailed. The remainder would be at risk of being restricted. In this way, and in the fullness of time, we would look for the day when it would be possible first to reduce and eventually to abolish recourse to loss of remission, or the addition of days, in disciplinary proceedings.

14.407 We do not, therefore, agree with the provision at present in paragraph 41 of Standing Order 3D, which provides that forfeiture should be restricted to privileges which have been abused in the course of committing the offence. We propose that if a prisoner commits a disciplinary offence affecting the life

of the prison, then it should be possible for him to lose a facility or an opportunity, even if he has not actually abused that opportunity or facility in committing his offence.

14.408 We are aware that the conduct of adjudications can be devolved by the governing Governor to another governor in the prison. We do not depart from that principle. But we believe that the Governor in charge of a prison should be prepared to consider offences which, if proved, are likely to lead to the imposition of the maximum penalties available. There could, therefore, in practice be a gradation of proceedings between junior governors and the Governor depending on the seriousness of the disciplinary offence being charged.

14.409 We accept that there are other offences committed by prisoners which, albeit committed in prison, raise issues as to the preservation of public law and order. They should be characterised as serious criminal offences. We recommend that cases which, because of their gravity, are not suited to be heard by a governor should be the subject of the same proceedings, and the same legal safeguards, as a criminal offence committed outside prison. We consider that there is unlikely to be a need, for a separate quasi-judicial authority to be established to consider these cases. There is no benefit to the administration of justice in establishing a separate authority. Such offences should be heard by the normal criminal Courts. If, however, our expectation proves wrong and, because of the number of cases involved, there proves to be a need for a special tribunal, that could be created at a later date.

14.410 We propose that consideration should be given, in particular in certain parts of the country, to establishing a special panel of Magistrates to hear charges in respect of criminal offences committed by prisoners. Consideration will also need to be given, in particular, to the prosecution of cases arising in the Isle of Wight, in whose small area there are three prisons.

14.411 Cases requiring the Courts to consider offences in prison could usefully be heard in or close to the prison where they were alleged to have been committed. However the public would have to have access, and there would be few prisons where this would be possible. Where there are arrangements, such as at the new Belmarsh Prison in London, which link the prison with a Court outside its walls, this could be achieved.

14.412 We recognise that there may in some cases be special factors applying to criminal offences committed in prison. In particular, as some evidence to us has pointed out, there may be difficulties about providing evidence to substantiate the charge. But that is a problem which relates to any proceedings of a serious nature, regardless of who is to hear it. The Prison Rules set out clearly that the standard for conviction is proof beyond all reasonable doubt.

14.413 We recognise also that the penalties available to the Court will be

limited in range. In effect, given the position of the alleged offender in prison, the penalty is further imprisonment. We would envisage, however, that a case would only be brought before the Court when the prosecution considers that the offence was so serious as to justify such a penalty, if proved. If it did not, disciplinary proceedings would be in order before the governor.

14.414 The Crown Prosecution Service would in due course be able to establish guidelines for the sort of offences which in its view would merit bringing proceedings before the Court. The general law would apply to offences committed in prison and the fact that offences were committed by persons already in prison would be taken into account, to the extent appropriate according to law, in deciding the length of any sentence. In due course, sentencing guidelines could be given by the superior Courts if this was necessary.

14.415 It is not wholly unprecedented for offences committed in prison to be heard by the outside Courts. The Prison Service told us that in 1988, 220 charges were referred to the police. It is not possible for us to forecast precisely how many more cases than this would in future need to be referred to the police with a view to bringing charges before the Magistrates Court. We will seek, however, to provide a broad estimate.

14.416 We were helped in making this estimate by information provided at one of our public seminars by a Prison Service official, Mr Brian Caffarey. He told the seminar that from April to December 1989 there were 1,723 punishments of unsuspended forfeiture of remission over 28 days. Those were cases dealt with by the Board of Visitors. Of those 1,723 punishments, 1,200 related to absconds, and failure to return from home leave. In our view, these are matters which, in almost all cases, are most properly considered as disciplinary offences and should in future be dealt with by a governor.

14.417 If that pattern were repeated over a 12 month period, and if all such cases involving absconds and failures to return to prison were in future dealt with by a governor, there should be less than 700 cases which might fall outside the governor's jurisdiction. We believe, for the reasons we have set out above, that many more of such cases ought in future to come within a governor's jurisdiction. And we would expect that, if our proposals in this Report were implemented, the overall level of offending in prison would fall. The number of cases coming to Court is, therefore, likely to be manageably modest.

14.418 We have considered with some care the arguments which were put to the Prior Committee about the involvement of Magistrates Courts in prison disciplinary proceedings. We noted that the Prior Committee believed that such a process had apparent attractions, but it decided against advocating it. We would set out the arguments more fully were it not for the fact that our proposals are not on all fours with those addressed by the Prior Committee. The heart of our proposal is that domestic disciplinary offences would in future

be dealt with by a governor. Only the most serious criminal offences meriting a prison sentence would go to the Courts.

14.419 Under our proposals, questions about the appeal procedures for the most serious offences fall away. Appeals in respect of cases brought before the Courts would be dealt with through the normal judicial process.

14.420 Appeals from the decision of a governor, however, are a different matter. There needs to be some avenue of appeal, and, in our view, there must be an independent element to it.

14.421 In considering what structure is required, it is necessary to take into account that a governor would be dealing with domestic disciplinary proceedings aimed at maintaining law and order within the prison. He would be exercising powers of punishment commensurate with those proceedings.

14.422 Under our proposals, it is clearly right that every prisoner who is subject to a governor's adjudicatory proceedings, should have some right of appeal. We have explained earlier why we do not believe that that appeal should be to the Board of Visitors. We propose that it continues, as at present, to the Area Manager. It should be open to the Area Manager to review the conduct of a governor's adjudication, or if he deems it necessary, to hold a rehearing of the proceedings, with the prisoner present. The Area Manager should have the power to quash the decision or to amend, up or down, the penalty. (We envisage however that it would be rare for the penalty to be increased.) The Area Manager should also be able to order that compensation be paid to a prisoner for loss of prison wages suffered before a decision was set aside on appeal. (This power is available in some of the jurisdictions we visited abroad.) The sums involved would be small, but it would be a visible indication of justice being done.

14.423 We do not think it is necessary, given the nature of the proceedings and the penalties involved, for the prisoner to have a right to appeal to the Courts. He would have, as now, the right to apply for judicial review. He would, as now, be entitled to write to the Secretary of State. It would be, as now, open to the Secretary of State to quash the finding and to amend the punishment, but not to rehear the case.

14.424 We recommend that, as an alternative or prior to writing to the Secretary of State, the prisoner aggrieved by an Area Manager's decision in respect of an adjudication should be able to appeal to the Complaints Adjudicator, whom we have described in the preceding parts of this Section. As we have already indicated, at that stage, so far as the prisoner is concerned, there is little difference from his position under the grievance procedure. A governor and the Area Manager have made decisions with which he disagrees. It is therefore appropriate that the same appellate body should be available. As with the grievance procedure, the Complaints Adjudicator would be a body of final resort.

14.425 The Adjudicator should again be the master of his own procedure. We would expect that he, or the assistant adjudicators acting on his behalf, would rarely hold a formal rehearing of the adjudication. Governors are already required to keep a record of the proceedings and the Adjudicator would be able to ensure he received all the material necessary to conduct a thorough review of the proceedings. The Adjudicator would be able to see reports from the Area Manager, the governor, the Boards of Visitors and the prisoner, and normally talk to the parties if he so wished. He would form his own view on the merits. He would then decide the appeal himself. Although he would have the power to direct a rehearing by a governor or the Area Manager, his powers would otherwise be the same as those we have proposed for the Area Manager.

14.426 The Complaints Adjudicator's powers would therefore differ from those available to him in considering grievances. It is right, and consistent with the principles of justice, that an independent element should be able to review and set aside findings which result in a prisoner staying in prison longer than would otherwise be the case.

14.427 The Complaints Adjudicator would instil an element of independence to the disciplinary procedure, as he would introduce such an element to the grievance procedure previously discussed. His ability to scrutinise the decision making process should ensure that the required standards were maintained by governors and Area Managers. This would be an expeditious and inexpensive process appropriate to the type of disciplinary proceeding heard by and the powers of punishment of the Governor.

14.428 We propose that there should be time limits for bringing disciplinary proceedings and for appeals. We commend the present time limit introduced by the Prison Service for bringing charges within 48 hours of the discovery of the offence. We propose that time limits should be set for appeals. As a guide, we would suggest that the prisoner should have a right to appeal to the Area Manager within 48 hours of a decision by the Governor, and to the Adjudicator within seven days from being notified of a decision by the Area Manager. We suggest that the Area Manager should have a target for determining an appeal in respect of a disciplinary offence. It should not be more than four weeks. We hope it would be considerably less. The Adjudicator may also wish to work to a similar timescale.

14.429 Boards of Visitors, as we have said, should not have a place in the conduct of disciplinary proceedings. But they would have a valuable role in relation to such proceedings. It would be consistent with their watch-dog role that they should be able to assist and advise the prisoner at the prisoner's request, in relation to governor's disciplinary proceedings and in relation to the prisoner's decision whether or not to appeal. It would be perfectly appropriate for the Board of Visitors, with the consent of the prisoner, to make representations to the Area Manager or the Adjudicator.

14.430 Their role may be the more important because, given the domestic

nature of these proceedings, we do not propose that prisoners should have a right of legal representation at these proceedings. We propose that the prisoner, at the discretion of the Governor, Area Manager, or Complaints Adjudicator should be allowed to bring with him to the proceedings either another prisoner, or a lawyer, or a prison officer.

14.431 We believe it would be fully consistent with the enhanced role of a prison officer which we have discussed in Section 13, that he should have the professional skill to act impartially as a friend of the prisoner in disciplinary proceedings. For the purpose of an appeal, the prisoner could seek the same assistance.

14.432 In the Inquiry's public seminar, Mr Coggan noted that any system of justice in prisons "takes no account at all of the underlying and informal justice which operates in the prisons" which, he suggested, ought perhaps to be called "the injustice system". The Prison Officers' Association were also concerned about what they described in their evidence to the Prior Committee of September 1984 (which they submitted as part of their evidence to this Inquiry) as the "underground" disciplinary system. Referring to court judgements opening up the prison disciplinary system to public scrutiny and judicial review they suggested that:

"One possible consequence - one that we deprecate - will be to drive the disciplinary system 'underground' and replace formal adjudications with administrative segregation, relocations, and adverse parole reviews and so on."

14.433 We are in no doubt that the Prison Service has a duty to ensure that that does not happen. The Prison Service raised this spectre in their evidence when it said: "The punishments available at an adjudication are by no means the only sanctions available to Governors." The Prison Service referred to the Governor having available a number of so called "administrative" measures. These included location under Rule 43 for reasons of good order or discipline, or transfer under the provisions of Circular Instruction 10/74. We discuss both of those measures in Section 12.

14.434 The Prison Service is under a misapprehension to describe these as sanctions. They are, or should be, used only as necessary and as specific responses to the actions of prisoners. They must not themselves be used as punishments (as the Prison Service itself recognises in relation to transfers, as we note in Section 12). Nor must they be used as sanctions which are in any way the equivalent of punishments. If a prisoner has committed an offence meriting punishment, then disciplinary proceedings should be brought against him. Rule 47 provides ample scope for such proceedings.

14.435 This sort of misconception should become a thing of the past if our recommendation for more reasoned decision making is implemented. The best protection against underground sanctions is to require and expect the Prison

Service at all levels to consider its decisions and to give the prisoner reasons for them. If the prisoner is not satisfied, he may then activate the complaints procedure.

Conclusion

14.436 Taken together, the recommendations and proposals in this Section build up into a substantial agenda for reform. We recognise that some would carry with them resource implications. In others, there would be savings. We are not in this Section proposing an approach which is diametrically opposed to the direction which the Prison Service is already taking. We are suggesting building on the work the Prison Service has started.

14.437 Our suggestions are directed to one of the themes which has run through this report, the theme of justice in prisons secured through the exercise of responsibility and respect. The achievement of justice will itself enhance security and control. These themes must come together in the programmes provided for prisoners and in the way they are treated in prison. They must come together also in what is expected of prisoners coming into the prison system.

14.438 The Prison Service has concentrated in recent years on structural and management issues. It must now concentrate fully on the prisoners in its care. The proposals in this Section are intended to assist it in achieving this. Were these proposals to be followed, then we believe that they would substantially influence the way prisoners come to view the prison system. While not preventing all disruptions, they would marginalise those who claim they must resort to deeply damaging and costly disturbances on the grounds that there is no other way to have their voices heard.